

COMPLIANCE BOARD OPINION NO. 00-10

October 18, 2000

Mr. Allen Dyer

The Open Meetings Compliance Board has considered your complaint concerning the regular practice of the Board of Education for Howard County (hereafter “County Board”) to meet in closed session with the Superintendent of Schools prior to open meetings. You alleged that this practice violates the Open Meetings Act. In its response, the County Board contended that this practice does not violate the Act and, in support of its position, identified the items addressed during these meetings over a four-month period.

For the reasons set forth below, we conclude as follows: In most instances, the issues addressed in the meetings with the Superintendent were administrative matters excluded from the coverage of the Open Meetings Act; accordingly, the County Board did not violate the Act by discussing them in closed session. In a few instances, however, we have identified matters that were improperly raised during these closed sessions, in violation of the Act. Finally, for several other matters, we lack sufficient information to state a conclusion about the legality of the closed-session discussion.¹

I

Complaint and Response

Your complaint alleged that the County Board routinely violates the Open Meetings Act by meeting with the Superintendent in closed, unannounced meetings prior to regularly scheduled open meetings.

In a timely ten-page response,² Mark C. Blom, Esquire, the County Board’s general counsel, acknowledged that the County Board has often held meetings with the Superintendent prior to regularly scheduled public meetings. The County Board’s position, however, is that these meetings involved “executive functions” outside the scope of the Open Meetings Act. In its response, the County Board

¹ In §10-502.5(f)(2) of the State Government Article, the Act recognizes that at times the Compliance Board will be unable to resolve a complaint.

² The Compliance Board granted the County Board a short extension of time to submit its response.

listed 42 items considered during these meetings over a four month period (February 24 to June 20, 2000) and explained why, in the County Board's view, these matters constituted executive functions.

II

The "Executive Function" Exclusion and State Education Law

A. *Executive Function Exclusion*

The County Board is a "public body" under the Open Meetings Act. Unless the subject of a particular meeting is excluded from the Act, a meeting of the County Board is subject to all of the requirements of the Act – in particular, the requirement that a meeting be open to public observation unless an exception in the Act allows for a closed meeting. Our inquiry, therefore, centers on whether the topics addressed during closed meetings between the County Board and Superintendent properly can be considered executive functions, as claimed by the County Board, and thus are not subject to the Act.

With exceptions not pertinent here, the Open Meetings Act does not apply to a public body when carrying out an executive function. § 10-503(a)(1)(i) of the State Government Article. The term "executive function" is defined in part by what it is not: a discussion that constitutes an advisory, judicial, legislative, quasi-judicial, or quasi-legislative function is by definition not an executive function. If a discussion is not encompassed by any of these other functions, however, *and* involves "the administration of" existing law, it falls within the executive function exclusion. § 10-502(d). *See, e.g.*, Compliance Board Opinion 99-10 (July 14, 1999), *reprinted in 2 Official Opinions of the Maryland Open Meetings Compliance Board* 64, 65. This second aspect of the analysis requires consideration whether the matter involves the development of new policy, or merely the application of an already established law or policy. The executive function exclusion covers only the latter. *See* Office of the Attorney General, *Open Meetings Act Manual* 13 (4th ed. 2000). Therefore, we must take account of the respective roles of the County Board and the Superintendent under the State's education law.

B. *State Education Law*

Subject to State statutory and regulatory requirements, the County Board exercises control over educational matters in Howard County. § 4-101(a) of the Education Article, Maryland Code.³ In furtherance of this overall responsibility, State law vests in the County Board a variety of tasks that must be considered in evaluating the application of the Open Meetings Act. Certain functions of the County Board would be classified as legislative or quasi-legislative functions under

³ All statutory references in this portion of the opinion are to the Education Article.

the Act, in that the County Board establishes policies for the Howard County Public Schools. *See, e.g.*, §4-108(3) (responsibility for determining school system's educational policies). The County Board also has broad administrative responsibilities in carrying out State law concerning the operation of the schools. *See, e.g.*, §§4-103 (appointment of certain personnel) and 4-115 (acquisition and disposition of real property; construction of schools). Although not relevant for purposes of the meetings at issue, under certain circumstances, the County Board also is responsible for conducting adjudicatory proceedings. *See, e.g.*, §6-202(a) (procedures for suspension or dismissal of certain personnel). Furthermore, the County Board appoints the County School Superintendent, subject to the approval of the State Superintendent, and sets the Superintendent's salary. §§4-201 and 4-202. Implicit in these duties is oversight responsibility for the Superintendent's performance. Compliance Board Opinion 95-5 (October 18, 1995), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 123, 124.

The Superintendent is the executive officer, secretary, and treasurer of the County Board and is responsible for carrying out its policies and regulations. §§4-102(a) and 4-204(b)(4) and (5). Among other responsibilities, the Superintendent is responsible for approving County Board contracts, evaluating each school's program of instruction, and taking the initiative in preparing the school system budget. §§4-205(d), (h), and (k)(1)(i). Although unable to vote on matters before the County Board, the Superintendent is entitled to advise the County Board on any matter under consideration. §4-102(c). The Superintendent is accountable to both the County Board and the State Superintendent of Schools. *See, e.g.*, §4-201(b)(3) and (e).

One provision of State education law also governs meetings of the County Board. In §3-704, the General Assembly has directed the County Board to meet at least twice each month and has generally required "all actions of the County Board [to] be taken at a public meeting and a record of the meeting and all actions shall be made public." *See also* §4-107(d) (meetings of county school boards).

The Open Meetings Act recognizes that other statutory provisions may apply to a meeting of a public body and, in the event of a conflict, the more stringent law applies. §10-504 of the State Government Article. In other words, the Act "outlines the minimum requirements for conducting open meetings." *City of College Park v. Cotter*, 309 Md. 573, 586, 525 A. 2d 1059 (1987). Therefore, even if the executive function exclusion results in the Act's inapplicability to a closed County Board meeting, nevertheless the County Board may not take a final action in such a closed meeting and, we infer from the County Board's response, apparently did not do so at the meetings discussed in this opinion. Given that our jurisdiction is limited to

Open Meetings Act matters, however, we reach no conclusions about the import or effect of the Education Article provision.⁴

III

Analysis of the Act's Application

Many of the items identified by the County Board are properly considered executive functions under the Open Meetings Act. Therefore, the County Board did not violate the Act by discussing such items in closed session. Discussion of certain other matters during these meetings, however, violated the Act. Included in this category are discussions of future agenda items that involve policy decisions of the County Board. For other matters, we lack sufficient information to make a definitive findings. We address each of these categories in turn.

A. Matters Excluded from the Act

Many of the items identified by the County Board clearly involved matters that may be considered executive functions. These items were not encompassed by any of the Act's other defined functions, did not involve the County Board's policy-making role, and can fairly be viewed as the carrying out of existing law or policy. They generally fall into three areas: communications from the Superintendent on administrative matters, questions or concerns raised by County Board members for the Superintendent's response, and housekeeping matters taken up by the County Board. Also included in this category are administrative matters involving the means by which the County Board intends to carry out specific statutory responsibilities, such as preparing the school system's budget for presentation to the County Council.

1. Superintendent's communications.

Included in this category are instances in which the Superintendent or his staff shared information with the County Board involving administrative matters under the authority of the Superintendent. These do not appear to involve policy matters that would be addressed by the County Board. In our view, the

⁴ Under §3-704(c) of the Education Article, the County Board "may take actions in closed session in accordance with §10-508 of the State Government Article" The latter provision lists 14 areas in which a public body is permitted to meet in closed session, subject to specified procedures in the Open Meetings Act. Because the County Board did not rely on the exemptions at the time of the meetings under review, these exemptions are immaterial for purposes of our review. To provide future guidance, however, this opinion will note exemptions that may have been applicable to certain of the County Board's discussions.

Superintendent's advising the County Board on such matters is consistent with the County Board's responsibility in overseeing the Superintendent's performance.

Examples of these communications include the Superintendent's informing the County Board of a planned mock emergency hostage situation at a county high school, a letter received from bus drivers employed by independent contractors concerning their wages, and revision of teachers' schedules to accommodate construction work at a school. Based on information provided in the County Board's response, these type of matters appear to be under the authority of the Superintendent. Even if County Board members discussed these matters in their meeting with the Superintendent, the matters remained executive functions. See, e.g., Compliance Board Opinion 95-8 (November 2, 1995), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 133, 136 (an executive or administrative decision vested in an individual official is not altered because a public body discusses the matter or offers advice).

2. Concerns raised by County Board members.

Also included in this category are concerns or questions raised by the County Board for the Superintendent's response, as long as they involve matters that are under the Superintendent's authority, rather than policy considerations for the County Board. Examples included a County Board inquiry concerning the date by which the Superintendent would make the annual designation of focus schools and its request for a copy of the survey results that had been distributed to principals and PTAs. Also in this category are complaints brought to the County Board's attention and passed along to the Superintendent for an appropriate response. This aspect of the County Board's activities is an inevitable consequence of the members' role as elected officials to whom constituents will address specific concerns, many of which are within the Superintendent's operational responsibilities. When these matters are raised at a meeting, they are an aspect of the County Board's carrying out of its oversight responsibilities.

3. Housekeeping matters.

This category also includes certain housekeeping matters -- administrative matters dealing with operations of the County Board that do not constitute other functions or policy decisions. At one of its meetings, for example, the County Board selected one of its members to represent it at a regional conference. We have often recognized that the process by which a public body itself makes an appointment, as distinct from the process of confirming an appointment made by someone else, is an executive function. See, e.g., Compliance Board Opinion 99-5 (June 22, 1999), *reprinted in 2 Official Opinions of the Maryland Open Meetings Compliance Board* 45, 47. Another example of a housekeeping matter is the presentation of a contract

for the County Board's chairman to sign.⁵ Also included in this category are discussions about attendance and the details of food and beverage service at events like retirement ceremonies, which are simply an aspect of the County Board's oversight responsibilities. Discussion of these or similar events is encompassed by the executive function exclusion.

4. Budgetary strategy.

At one meeting noted in the County Board's response, the chairman requested that members provide suggestions regarding her testimony at an upcoming budget presentation to the County government. With the advice of the Superintendent, the County Board is responsible for preparing a budget for the school system in accordance with State statutory and regulatory requirements and for submitting its proposed budget to the county government. §§5-101 and 5-102 of the Education Article. The County Executive makes an initial decision about funding the County Board's proposed budget, and final approval rests with the County Council.

In our view, the budget process for the County Board tracks the distinction between the budget formulation and budget consideration stages recognized in a somewhat different context by the Maryland Court of Appeals. In *Board of County Commissioners v. Landmark Community Newspapers*, 293 Md. 595, 446 A.2d 63 (1982), the Court suggested that, in a county where the county commissioners both developed a proposed budget and later considered the budget through its legislative process, the budget formulation phase was an executive function under the Act. We have likewise adopted this distinction in our opinions. *See, e.g.*, Compliance Board Opinion 99-10 (July 14, 1999), *reprinted in 2 Official Opinions of the Maryland Open Meetings Compliance Board* 64, 66. Applying this distinction to a school system's budget process, we conclude that discussion during a County Board meeting about its strategy in presenting its budget to the county government is an executive function. Of course, consideration of the budget by the County Council would be a quasi-legislative function under the Act.

B. Matters Covered by the Act

We have identified a few matters that did not fall within the executive function exclusion and that therefore should not have been discussed in sessions closed without following the Act's procedures.

⁵ Based on the response provided by the County Board, it does not appear that this matter involved a contract that required approval of the County Board. Had County Board approval been necessary, the matter would have constituted a quasi-legislative function under the Act. §10-502(j)(3).

1. Substantive policy issues.

During one of its meetings with the Superintendent, the County Board discussed the appropriate charge for a committee established to review how County Board members are elected in the county. Although the method of election is a policy question, only the General Assembly, not the County Board, will decide the question. Accordingly, this matter cannot be said to be a legislative or quasi-legislative function of the County Board. Nor does this matter appear to be part of an advisory function of the County Board, for we are not aware that the County Board has been delegated responsibility to advise on the manner of its own election. *See* §10-502(b) (definition of “advisory function”).

Nevertheless, although this matter does not fit into any other defined function, it fails the second part of the executive function test. As we have previously explained, “it does not necessarily follow that an activity outside the other defined terms is perforce an executive function. The activity must still meet the central definition of ‘executive function’ itself – that the activity involves ‘the administration of ... a law ...’” *Compliance Board Opinion 94-7* (August 16, 1994), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 96, 98. A discussion of how a committee should review the method of election of County Board members is an aspect of a future policy debate on issues like the appropriate geographic constituencies for County Board members; it does not involve the County Board’s administration of current educational law. Hence, the conduct of this discussion in a closed meeting violated the Act.

At another meeting, the County Board discussed the logistical details of an invitation by a County Board member to an outside group to use the County Board’s offices for a meeting. Although this topic gives the impression of being merely an administrative housekeeping matter, apparently it raised questions that the County Board had to address because there was no current policy in place. If this discussion was indeed an aspect of formulating a policy on the use of the County Board’s facility for outside groups’ meetings, it should not have been done in closed session.

2. Agenda setting for policy matters.

A violation also occurred when the closed session with the Superintendent included identification of a County Board policy matter as a future agenda item. We have previously opined that “the legislative process begins with a decision to put a matter on the agenda.” *Compliance Board Opinion 96-3* (April 9, 1996), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 157, 159. In that opinion, we concluded that the executive function exclusion did not justify closed-door luncheon meetings of the Baltimore City Council at which future legislative agendas were discussed.

The same reasoning applies to policy-related agenda decisions at the County Board. When the Superintendent or a County Board member indicates a desire that a policy matter be placed on a future agenda, that request invites discussion about the priority that should be assigned the matter and, even if no such discussion in fact occurs, denotes the first step in policymaking: a recognition that a problem is ripe for consideration.

At the closed meetings itemized in the County Board's response, policy-related agenda setting apparently occurred twice. At one meeting, the Superintendent advised the County Board that he would present a policy on student promotion and retention at a future public meeting. At another meeting, the County Board asked about the staff's revision to school redistricting policies and decided to add this matter to the published quarterly agenda of public business.⁶ Because both of these items appear to involved policy questions that would later be considered by the County Board, discussion of the scheduling of these matters should not have taken place in closed session.

C. *Additional Areas of Concern*

Several items identified in the County Board's response lacked sufficient detail for us to make a determination whether they could properly be considered excluded from the Act as executive functions or whether they were policy matters for the County Board that were subject to the Act. As to these, although we cannot reach a conclusion, we shall explain why they are questionable.

At one meeting, the Superintendent reported that he met with the County Executive and with committee chairs appointed by the Superintendent to discuss the status of the committees' work. Also, the County Board asked about plans for drug-free high school graduations. It is unclear whether these matters were policy matters that would be considered by the County Board. If they were, even preliminary briefings or discussions were covered by the Act, not excluded from it. As the Court of Appeals has observed, "it is clear that the Act applies, not only to final decisions made by the public body ... but as well as to all deliberations which precede the actual legislative act or decision, unless authorized by [the Act] to be closed to the public." *City of New Carrollton v. Rogers*, 287 Md. 56, 72, 410 A.2d 1070 (1980). And, as we have pointed out, "the imparting of information about a matter, albeit unaccompanied by any discussion among the members of a public body, constitutes the 'consideration or transaction of public business.'" Compliance Board Opinion

⁶ Under §4-109(c) of the Education Article, the County Board, with the advice of the Superintendent, "shall determine the geographical attendance area for each school" The consideration and approval of a particular redistricting plan may well be an executive function, the administration of this statute. The formulation of policy criteria to guide future redistricting, however, goes beyond the executive function.

93-6 (May 18, 1993), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 35, 36. If the County Board would be required to make policy decisions on these matters, even preliminary discussions in closed session were inappropriate (unless one of the Act's exceptions applied).⁷

At another meeting, the County Board addressed the impact of increased e-mail from the public on the workload of the County Board's secretary, taking time away from her other administrative duties. If the discussion was simply an evaluation of current policy on public communications and its impact on the workload of the County Board's staff, it may be considered an executive function. If, however, the discussion involved a policy question about the public's ability to communicate with the County Board by e-mail, the discussion was subject to the Act and presumptively should have occurred in an open meeting.⁸

At one meeting, the Superintendent advised that his staff was encountering problems in finding sites for new schools and that he would schedule a closed meeting with the County Board to discuss site acquisition. It is not clear whether this issue involved the formulation of some general policy for future site acquisition, which would be beyond the executive function exclusion and to be discussed only in open session; aspects of contract negotiation for particular school sites, which would be a quasi-legislative function subject to the Act but probably within the Act's exception allowing closed sessions to discuss the acquisition of real property, §10-508(a)(3); or matters related to neither future policy nor contract, in which case closed-session discussion was permitted under the executive function exclusion.

We are also informed that, at one meeting, the County Board discussed concerns with phraseology in a letter written on its behalf by a private attorney. If the letter involved the application of current law or policy, the discussion may properly be considered an executive function. However, if the letter involved a

⁷ In contrast, a briefing on a matter that the County Board would handle as an executive function would not violate the Act. For example, the Superintendent and Associate Superintendent for Finance and Operations briefed the County Board on community complaints about planned construction projects. Because we view the managing of school construction projects as an executive function of the County Board under State law, the briefing in executive session was not in violation of the Act. *See* Compliance Board Opinion 00-5 (June 28, 2000) (school board's consideration of space planning matter was the "carrying out [of] a function under existing law"). Approval of a construction contract, however, would constitute a quasi-legislative function under the Act.

⁸ We note that, if a policy-related discussion were inextricably entwined with consideration of the workload of a specific individual, the matter could have been addressed in a meeting closed under the "personnel" exception in §10-508(a)(1).

policy matter or other matter outside the executive function, the discussion was subject to the Act.⁹

The County Board also considered rules and procedures pertaining to the public comment portion of its open meetings and the most appropriate response should a disruption occur at that evening's public meeting. We have previously addressed whether this type of discussion might constitute an executive function. Recognizing that the issue was a close one, we concluded that such a discussion is *not* an executive function when a public body is dealing "with an administrative issue that it had not previously encountered" and is "not administering any identifiable law or policy 'already in force and effect.'" Compliance Board Opinion 95-2 (June 20, 1995), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 113, 115. It is unclear from the County Board's response whether the County Board was reviewing its existing policy or "was formulating a new policy to deal with [an] unanticipated situation." *Id.* The latter should not be discussed as if the Act were inapplicable.

Finally, at one meeting, the Chairman asked that the other members consider whether to prepare a resolution to the Maryland Association of Boards of Education and to recommend programs for an upcoming conference of the Association. We recognize that the Association is a private entity of which the County Board is a member. If this discussion involved internal Association affairs or otherwise reflected solely the position of the County Board as an Association member, presumably there was no "conduct of *public* business," and the Act was inapplicable.¹⁰ However, any resolution offered as a public policy position of the County Board should have been discussed in an open meeting.

D. Miscellaneous

At one meeting identified in the County Board's response, the Superintendent provided information concerning a compensation and benefit package applicable to three employees of the school system. The response of the County Board stated that "[t]he Board decided to discuss the issue later (which it did in a properly convened closed meeting to discuss a personnel matter)." We have previously indicated that the Compliance Board will not find a violation when a public body immediately recognizes that a newly raised topic cannot be lawfully be discussed in

⁹ If the letter involved pending or potential litigation and the discussion included the Superintendent or other person, the County Board would have been justified in closing the meeting in accordance with §10-508(a)(8).

¹⁰ Similarly, it is not clear whether program recommendations would be passed onto the Association as recommendations of the County Board or as individual suggestions of County Board members.

a closed session and does not discuss that topic further. Compliance Board Opinion 95-3 (July 12, 1995), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 117, 119. We believe that the same reasoning applies here, for the County Board evidently recognized that the topic was not excluded from the Act and promptly ended its discussion. Therefore, we find no violation in the County Board's handling of this matter.

IV

Conclusion

As we have previously observed, a determination about the executive function exclusion can be made only in light of the particular nature of the discussion. Compliance Board Opinion 94-7 (August 16, 1994), *reprinted in 1 Official Opinions of the Maryland Open Meetings Compliance Board* 96, 97. Sometimes the facts made available to us are too limited to allow for a decision about a particular matter. Nevertheless, we have attempted to provide guidance that will assist the County Board and other boards of education in the future. In his response, the County Board's general counsel indicated that the County Board has reviewed its procedures to ensure compliance with the Act. The Compliance Board encourages this type of review.

In your complaint, you requested that the Compliance Board publish its decision in the *Maryland Register* and provide counseling for the County Board regarding the avoidance of future violations. Compliance Board decisions are routinely published in the *Maryland Register*, and as noted, we have attempted to give guidance throughout this opinion for the consideration of the County Board.¹¹

OPEN MEETINGS COMPLIANCE BOARD*

Courtney McKeldin

Tyler G. Webb

*Chairman Walter Sondheim, Jr. did not participate in the preparation or approval of this opinion.

¹¹ You also requested that "consideration of the egregious violations by the ... Board of Education" be considered in the Compliance Board's annual report. As this opinion makes clear, the few identified violations can hardly be characterized as "egregious." In any case, the annual report of the Compliance Board reflects a summary of our opinions throughout the previous year.